DCCUMENT RESUME

ED 033 980 UD 008 337

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TITLE Racial Imbalance in the Public Schools: A Survey of Legal Develcpments.
INSTITUTICN Chio State Civil Rights Commissicn, Cclumbus.
Pub Date Apr 65
Note 26p.

EDRS Price EDRS Price MF-$0.25 HC-$1.40
Descriptcrs Dejure Segregaticn, *Federal Laws, Integraticn Litigaticn, *Public Schools, Racial Balance, *School Integraticn, Schocl Zcning, *State Laws
Identifiers Elccker Doctrine, Civil Rights Act cf 1964, Cleveland, Gary, Hillsbcro, Kenston, New Rochelle, Springfield

Abstract

Reported are the major legal cases (up to 1965 and in varicus parts of the ccuntry) pertaining to defacto school segregation. The document reviews the cases under the rubrics cf dejure segregaticn, gerrymandering of attendance zones, the question of obligation tc integrate, the discretionary authcrity of schocl bcards, teacher assignment, and Federal guarantees and rights. (NH)

Racial Imbalance in the Public Schools

A Survey of Legal Developments

Ohio Civil Rights Commission
240 PARSONS AVENUE
COLUMBUS, OHIO 43215

April, 1965

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Columbus Blank Book Company
Columbus 7, Ohio
1965
Bound by the State of Ohio

FOREWORD

This publication represents the third study of The Ohio Civil Rights Commission relative to legal developments in the field of *de facto* segregation in the public schools.

The Commission's initial report was issued in December, 1962. Requests for copies were received in large number and, in April, 1964, the original study was republished, together with a supplement of intervening cases.

Because of the continued large number of requests, the Commission has again supplemented the study with cases which have been reported to the date of publication (April, 1965).

This publication is not intended as a legal brief or as a partisan statement but, rather, as an objective and non-technical study of the divergent viewpoints which exist.

This study, inclusive of the legal research and preparation of text, was performed by Jerry Belenker, staff counsel for the Commission.

RACIAL IMBALANCE IN THE PUBLIC SCHOOLS

A Survey of Legal Developments

I. INTRODUCTION

The field of education is subject today to scrutiny and evaluation of the most intensive sort. This phenomenon stems not only from the inherent obligation of educators to explore the subject matter of their profession, but also from the increasing insistence by the public at large that the maximum advantages of public education accrue to the greatest possible number of students. This insistence has been stimulated largely by the dramatic changes, both quantitative and qualitative, in the educational needs and aspirations of contemporary society. The description of education as ". . .perhaps the most important function of state and local government. . .the very foundation of good citizenship. . . " [1] is, therefore, especially apt. In this context, racial segregation and racial "imbalance" have emerged as substantial issues from the point of view of law as well as of educational psychology, and increasing concern has been expressed as to whether or not the very *existence* of wholly or predominantly Negro schools, irrespective of cause, tends to mitigate the quality of education obtained by the students of such schools.

This study directs itself to the legal significance and implications of so-called "de facto segregation" or "racial imbalance." Both terms signify the existence of public schools in a given system which are either predominantly white or predominantly Negro as the result of the racial composition of the neighborhoods from which the students attending the individual schools are drawn. The terms "de facto segregation" or "racial imbalance" are to be distinguished from "de jure" segregation, which signifies the intentional segregation of students on the basis of race either by force of law or other governmental action designed to achieve such segregation.

II. DE JURE SEGREGATION

It should be stressed at the outset that intentional *(de jure)* racial segregation of students is illegal throughout the United States on the grounds that such a practice contravenes the guarantee of equal protection of laws contained in the Fourteenth Amendment to the United States Constitution. The landmark decision of the U. S. Supreme Court in the 1954 public school desegregation cases clearly and unmistakably repudiated state enforced segregation in the following terms:

> "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group equal educational opportunities? We believe that it does.
>
> ". . . To separate them . . . (Negro children) . . . from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . .
>
> "We conclude that in the field of public education the doctrine of separate but equal has no place. *Separate educational facilities are inherently unequal."*(2)

Although the 1954 decision apparently came as a substantial surprise to many, it is arguable that the decision could have been predicted by a close reading of earlier court decisions dealing with racial segregation and discrimination in higher education.(3) It is hoped, therefore, that a study of salient post-1954 litigation will illustrate the continuing evolution of the law and, by so doing, render a service to all interested parties.

III. GERRYMANDERING OF ATTENDANCE ZONES

NEW ROCHELLE, N.Y.

Even in the absence of statutes or ordinances which require racial segregation in the public schools, it is illegal for local school boards to construct school attendance zones or to take other action specifically designed to cause the racial segregation of students. There is also precedent to the effect that, where such practices have existed in the past, it is the duty of the *incumbent* school authorities to remedy the effects of their predecessors' actions. These principles are illustrated in the case of *Taylor vs. Board of Education*, which arose in New Rochelle, New York, in 1961.[4] The facts were as follows:

A Federal circuit court found that the New Rochelle School Board had, since 1930, gerrymandered school district lines so that Negro pupils were confined to one school (Lincoln), which was also attended by some white students. In 1949, the school board permitted the white children in the Lincoln School to transfer to other elementary schools. During the same year, when the Lincoln School's student population had become virtually all Negro, the school board imposed a "freeze" and refused all requests by Negro children for transfers to other schools. Efforts at redress, from 1949 to 1960, were unavailing. Finally, a lawsuit was filed to enjoin the construction of a new school on the site of the now obsolete Lincoln School. The plaintiffs contended that the construction of a new school, on the same site as the old Lincoln School, would perpetuate the existing segregation. The New Rochelle School Board argued that the Lincoln School was not a component of a "dual system" of education and that the school's student population was 94 per cent Negro, rather than 100 per cent. To these contentions, the court responded:

> ". . . I see no basis to draw a distinction, legal or moral, between segregation established by the formality of a dual system of education . . . (as in the 1954 school desegregation cases) . . . and that created by gerrymandering of school district lines and transferring white children as in the instant case . . . *The result is the same in each case: the conduct of responsible school officials has operated to deny to Negro children the opportunities for a full*

and meaningful educational experience guaranteed to them by the Fourteenth Amendment."[5]

The court also stated that the presence of some 29 white children in the Lincoln School did not afford the 454 Negro children "the educational and social contacts and interaction" envisioned by the 1954 school desegregation cases.

To the school board's contention that it was following a "neighborhood school policy," the court responded that the plaintiffs:

> ". . . are not attacking the concept of the neighborhood school as an abstract proposition. They are, rather, attacking its application so as to deny opportunities guaranteed to them by the Constitution . . . The neighborhood school policy certainly is not sacrosanct. It is valid only insofar as it is operated within the confines established by the Constitution.
>
> "It cannot be used as an instrument to confine Negroes within an area artificially delineated in the first place by official acts. If it is so used, the Constitution has been violated and the courts must intervene."[6]

Subsequently, the court approved a desegregation program, a major component of which was the permissive transfer of students out of the Lincoln School. [7]

Several principles emerged from this case, including the following:

1. Illegal segregation may be found to exist even in the absence of statutes or regulations requiring segregation;

2. Illegal segregation may be found to exist even though there is not a 100 per cent separation of students on the basis of race;

3. Illegal segregation may be found to exist even though the present school officials have not discriminated, but have nevertheless failed to correct a discriminatory situation brought about by the acts of previous officials;

4. Where necessary, a court has the authority to modify even such generally accepted practices as "the neighborhood school."

5. Permissive transfers constitute one acceptable means of countering school segregation.

The U. S. Commission on Civil Rights has characterized the *New Rochelle* case in these words:

". . . school boards having uniracial schools can no longer justify it merely on the basis of residential patterns in combination with a neighborhood school policy. *Any existing segregation may be constitutionally suspect.* School boards that want to operate their schools in a constitutional manner may have to inquire into the cause of any existing segregation. They may have to prove that zoning laws follow residential patterns by coincidence, not design; that the sites and sizes of schools were not fixed to assure segregation; that racial residential patterns were not officially created in the first instance. *Thus New Rochelle challenges many school boards in the North and West which have thought they were immune from attack because existing segregation did not result from school assignment explicitly by race."*[8]

HILLSBORO, OHIO

An analagous situation stemmed from the practices of the Board of Education of Hillsboro, Ohio, and came before a U. S. Court of Appeals in 1956. [9] The following digest of the facts is taken from the court's decision that the Hillsboro schools were partially segregated:

"There is no controversy as to the material facts of the case. There are three elementary schools in Hillsboro, Ohio: Washington, Webster, and Lincoln. Washington and Webster schools have 12 regular elementary classrooms each, with one teacher assigned to each room and teaching one grade in the room. *For approximately 15 years prior to September 7, 1954, the Webster and Washington Schools have been attended exclusively by white children.*

* * * * * * *

"The Hillsboro schools in part have complied with the Ohio law. The High School in Hillsboro is attended by both Negro and white children. The segregation of pupils in the 7th and 8th grades was discontinued by the Board in 1951. But the long-standing segregation of Lincoln School still exists. On September 7, 1954, plaintiffs, colored children, were registered, three in Webster and four in Washington School and each assigned a seat in a classroom. *Immediately thereafter the schools were closed for several days, and on September 14th, plaintiffs were reassigned to Lincoln School.*

> "On September 13 the Board established school zones for the City of Hillsboro. This was the first zoning ever set up for the Hillsboro schools. The resolution of the Board divided the City into three school zones: Washington, Webster, and Lincoln. *The Lincoln zone was divided in two completely separated parts, one in the Northeast and one in the Southeast section of the city. Three of the plaintiffs who live in the Southeast part of the Lincoln zone have to pass by the Washington School in order to reach the Lincoln School. The Lincoln School is not in the Lincoln Zone, but in the Washington Zone."*(10)

There was also uncontradicted testimony that the Board planned to rebuild the Webster School and to enlarge the Washington School following which the Lincoln School would be abandoned. The Court stated, however, that neither the contemplated abandonment of the Lincoln School, nor a 1954 resolution of the Board supporting integration for children of the Lincoln School on completion of Washington and Webster School buildings, was sufficient to negate the existing segregation. Immediate relief was therefore ordered for the Negro plaintiffs and the Court ordered that all school segregation terminate at or before the beginning of the next school term.

It is instructive to note the concurring decision of Judge Potter Stewart, now a member of the U. S. Supreme Court:

> ". . . The Hillsboro Board of Education created the gerrymandered school districts after the Supreme Court had announced its first opinion in the segregation cases. *The Board's action was therefore, not only entirely unsupported by any color of State law, but in knowing violation of the Constitution of the United States.* The Board's subjective purpose was no doubt, and understandably, to reflect the 'spirit of the community' and avoid 'racial problems,' as testified by the Superintendent of Schools. *But the law of Ohio and the Constitution of the United States simply left no room for the Board's action, whatever motives the Board may have had."**(11)

* The Ohio Supreme Court stated in 1888 that the power of a Board of Education to assign students to schools does not mean that such power can be exercised " with reference to the race and color of the youth and no regulation can be made that does not apply to all children irrespective of race or color." (12)

IV. IS THERE AN AFFIRMATIVE DUTY TO INTEGRATE

There is substantial controversy as to whether or not public school systems are obligated to take affirmative action to undo racial imbalance or *de facto* segregation, i.e., whether they must take *action to achieve racial integration in the public schools*, despite the existence of segregated neighborhoods, as opposed to an obligation *simply to take no action designed to bring about segregation.*

It will be recalled that the U. S. Supreme Court stated in 1954 that ". . . separate educational facilities are inherently unequal . . ."[12] The facts which were then before the court related specifically to state imposed, or *de jure* segregation, although it has been argued that the inherent inequality to which the court referred is present even in instances of *de facto* segregation.

The following discussion cites cases to the effect that there is no legal obligation to integrate public schools merely because they are characterized by "racial imbalance." This is followed by a discussion of cases which tend to indicate either (a) that there is a positive obligation to bring about integration, or (b) that the school authorities *may*, at their discretion, take action to achieve this result, even in the absence of a mandatory duty.

THE BELL DOCTRINE

The issue of whether students have a constitutional right to attend racially integrated schools, *even in the absence of state imposed segregation*, was answered negatively by a U. S. Court of Appeals on October 31, 1963[14] in the context of the following fact situation relative to Gary, Indiana.

About 53 per cent of the 43,090 students in the Gary, Indiana public schools were Negroes. Seventeen schools, with 23,223 students, had Negro populations ranging from 77 to 100 per cent. Four schools, with 4,066 students, had Negro student populations ranging from 13 to 37 per cent. Five schools, with 5,465 students were one to 5 per cent Negro. All schools but one had at least one Negro teacher and all but 5 had at least one white teacher. Students were generally assigned to schools on the basis of neighborhood.

Negroes held the positions of school board president; assistant superintendent; coordinator of secondary education; supervisor of

special education; mathematics consultant and other positions. There were 18 Negro principals and assistant principals, and 38 white principals and assistant principals. There were 798 Negro teachers and 833 white teachers. Overt segregation had existed in part of the Gary School System prior to 1949, but the State law making this permissible had since been repealed. Some Negro students had been transferred into predominantly white schools in order to alleviate overcrowded conditions.

In prior litigation, a federal district court[15] had ruled that racial imbalance was not the equivalent of segregation. The reviewing Court of Appeals agreed, stating that:

> ". . . a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races . . . (need not) . . . be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites . . ." [16]

The U. S. Supreme Court subsequently refused[17] to review the decision of the Court of Appeals, thereby permitting it to stand.*

CASES IN SUPPORT OF THE BELL DOCTRINE

Support for the Bell Doctrine is found in *Downs vs. The Board of Education of the City of Kansas City, Kansas.*[18] In this case, a federal Court of Appeals noted that there was some precedent to the effect that school boards had an affirmative duty to eliminate de facto segregation but held it to be the "better rule" that ". . . although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them . . ." The Court maintained that there is no requirement for ". . . a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where . . . that school system had been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation."

* The refusal of the U. S. Supreme Court to review a case, although permitting the lower court's ruling to stand, is not the equivalent of an affirmation by the Supreme Court, and should not be thought of as an affirmative ruling on the merits of the case.

The U. S. Supreme Court has declined to review this decision, thereby permitting it to stand.[19]

In the Kansas City case, some 73 per cent of the Negro students attended nine schools which were predominantly Negro. For many years prior to 1954, the school system had been operated on a segregated basis with regard to both students and teachers. A degree of integration had been attained at the time of the lawsuit, as indicated by the fact that some 27 per cent of the Negro students attended 26 integrated schools.*

KENSTON, OHIO

A 1964 federal district court decision in Ohio[21] tends to support the Bell Doctrine. In this case, Negro plaintiffs claimed that the Kenston, Ohio school board assigned pupils to particular schools by reference to their home address and inasmuch as they resided in a predominantly Negro area, this practice resulted in a school which was almost exclusively Negro. Plaintiffs contended that the resulting racial separation engendered feelings and attitudes which:

> ". . . interfere . . . with successful learning. In the minds of Negro pupils and parents and in the mind of the community as a whole, a stigma is attached to attending a school the enrollment and faculty of which are completely Negro, and this stigma results in a feeling of inferiority which interferes . . . with the learning process."[22]

The Court rejected the plaintiffs' arguments, citing the *Bell* case, and remarking:

> ". . . the law is color blind and, in cases such as this, that principle, which was designed to insure equal protection to all citizens, is both a shield and a sword. While protecting them in their right to be free from racial discrimination,

* The Kansas City school system had also adopted a transfer system under which a student could elect to transfer out of a school in which a majority of students were of another race. This transfer system, however, was declared invalid both by the trial court and the Court of Appeals, on the grounds that ". . . no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." The U. S. Supreme Court had previously (1963) invalidated a transfer plan which enabled students who were in a racial minority in their assigned school to transfer to a school in which their race constituted a majority. The Supreme Court had noted that such plans, although applicable to Negro and white students alike ". . . promote discrimination and are therefore invalid."[20]

it at the same time denies them the right to consideration on a racial basis when there has been no discrimination."[22]

CLEVELAND, OHIO

The foregoing opinion was issued in May, 1964. In July of that year, the same federal court refused to enjoin the Cleveland Board of Education from constructing 3 new elementary schools which would be composed largely of Negro children, many of whom had previously been bussed to schools with predominantly white enrollments. The court noted that the proposed schools were to be built in an area which had become predominantly Negro within a decade and the evidence revealed ". . . no trace of deliberate design to segregate . . ."[24]

FEDERAL CIVIL RIGHTS ACT OF 1964

The Federal Civil Rights Act of 1964,[25] insofar as it relates to the issue of racial imbalance in public schools, tends to follow the doctrine of the *Bell* case. This is evidenced by two provisions of Title IV of the Act. The first provision (Section 401b) defines "desegregation" but states that desegregation ". . . shall not mean the assignment of students to public schools in order to overcome racial imbalance." Thus, the technical assistance and training institutes provided under the Act are not available to school systems which wish to desegregate by means of the reassignment of students.

In addition, Section 407a, providing for intervention by the U. S. Attorney General in desegregation lawsuits, states that ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."*

* It does not appear that the statute *prohibits* Federal courts from ordering the reassignment of students in order to relieve racial imbalance but, rather, that the statute is not to be deemed to require or to serve as the basis for such action. The courts can presumably draw upon their inherent powers to frame orders and decrees which are equitable in the light of a given fact situation. Note that a Federal district court in Massachusetts, subsequent to passage of the statute, ordered a school board to prepare a plan to alleviate "racial concentration" which had not been brought about intentionally. (See p. 16 of this report)

THE BLOCKER DOCTRINE (AFFIRMATIVE DUTY)

In January, 1964, a Federal District Court in New York[26] issued a ruling which generally *supports* the contention that school boards *have* an affirmative duty to achieve integration. The facts were as follows:

The school system of Manhasset, Long Island was composed of three elementary school attendance areas and children were assigned solely to the elementary school in their specific attendance area. (One Junior High School and one Senior High School served the entire school district.) All of the 166 Negro children in the entire district plus 10 white children attended one elementary school (Valley School). The remaining 1,274 white elementary school students attended the two other elementary schools.

The basic contentions, as summarized by the Court, were as follows:

> "The plaintiffs contend that the racial imbalance in the Valley School is segregation in the constitutional sense . . . that segregated schools, be they segregated *de jure* or "*de facto*", are inferior per se and deprive children of minority groups of equal educational opportunities. This segregation, they contend, is the result of the defendant District's rigid neighborhood school policy; that, though innocent and harmless in its inception, the continued enforcement of this policy . . . is tantamount to a law compelling segregation . . . The plaintiffs concede that the Valley School is equal to the all-white schools in facilities . . . etc . . ."[27]

On the other hand, the defendent school district contended that:

> ". . . the neighborhood school policy of the District is color blind; that it operates equally upon all children within each attendance area, regardless of race or color; that the racial imbalance . . . is . . . due solely to the pattern of housing . . . for which they are not responsible; that, therefore, they are under no duty to change attendance area lines . . . the defendants maintain that the plaintiffs have failed to prove any deprivation of Fourteenth Amendment rights."[28]

The Court posed the following hypothetical question:

> "Were the Board to create out of the total district one disproportionately small attendance area . . . composed almost entirely of Negro children and representing

100% of the Negro student population of the District, and couple such action with a rigid no-transfer policy . . . would it not be reasonable to regard it as a rather ingenuous device to separate the races, protestations to the contrary notwithstanding? Could such attendance lines, if drawn today, be insulated from the Fourteenth Amendment merely because the bylaw or rule of the Board did not mention the word Negro, but, rather, was cast in terms of attendance?"

The Court answered its question by ruling that the case before it was one of state imposed segregation.

". . . the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In the light of the existing facts, the *continuance* of the defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation . . . This segregation is attributable to the State . . . *In a publicly supported, mandatory state educational system the plaintiffs have the civil right not to be segregated, not to be compelled to attend a school in which all of the Negro children are educated separate and apart from over 99% of their white contemporaries. That they are being so compelled is a fact.*"[29]

The Court ordered the Manhasset Board of Education to submit by April 6, 1964, a plan to desegregate the elementary schools, to begin no later than the opening of the 1964-65 Fall Term.

SUBSEQUENT ACTION IN BLOCKER CASE

The Manhasset School Board subsequently submitted a proposal to close the predominantly Negro Valley School and to reassign the students in approximately equal numbers to the two remaining elementary schools. The facts indicated that neither of the two remaining schools would become overcrowded and that the curricula of the schools would not be adversely affected by this action.

The Court reviewed the desegregation plan[30] and ruled that, although it would not require the *closing* of the predominantly Negro school, it would require the school board to permit elementary school pupils in the Valley attendance area to *transfer* to the other elementary schools at the request of their parents or guardians. The Court also ruled that the Manhasset School Board could make no restrictions as to the number or proportion of Valley

pupils who could transfer and that it must provide suitable physical space and appropriate educational arrangements in the elementary schools to which the pupils might transfer. In addition, those students who might move into the Valley attendance area were to be given the right to attend other schools. The Court retained jurisdiction over the case to assure full compliance with its decree.

The Court also discussed its earlier decision of January 24, 1964, so as to make it clear that it did not require:

> ". . . a compulsive distribution of school children on the basis of race in order to achieve a proportional representation of white and Negro children in each elementary school within the District or the closing of any elementary school for such a purpose. The Court did not hold that the neighborhood school policy per se is unconstitutional but, rather, that it is not immutable . . . In effect, the court was directing the Board to unlock the gate which confines 100 per cent of the Negro children to the Valley school and thereby separates them from practically all of the white children of the District . . ."[31]

SPRINGFIELD, MASSACHUSETTS

In a recent case which originated in Springfield, Massachusetts, a Federal district court[32] found that the the public schools of that city were segregated ". . . in the sense of racial imbalance" despite the fact that attendance zones had been drawn on the basis of nonracial criteria, and despite the finding that there was ". . . no deliberate intent on the part of the school authorities to segregate the races . . ." The Court held that such racial concentration gives rise to educational inadequacies and must, therefore, be undone.

The Springfield school system contained 3,386 Negro elementary school students, constituting 17.4 per cent of the total elementary enrollment. All but 595 of the Negro elementary school students were enrolled in eight elementary schools, in which Negro enrollment ranged from 45.9 per cent to 89.9 per cent. In the city's eight junior high schools, there were 6,546 students, including 946 Negro students. 702 of the latter were in one school, in which they comprised 62.9 per cent of the enrollment and 117 were enrolled in a school in which they comprised 14.9 per cent of the enrollment. The balance (127) were distributed in the remaining six junior high schools.

The court ruled that ". . . in the light of the ratio of white

to non-white in the total population in the City of Springfield . . . a non-white attendance of appreciably more than fifty per cent in any one school is tantamount to segregation."

The rationale of the decision, which rejected the *Bell* doctrine and which laid heavy stress on psychological factors, can best be presented in the court's own words:

> ". . . those schools in which the vast majority of Negro students are enrolled consistently rank lowest in achievement ratings . . . those students, when transferred to other schools, had difficulty keeping abreast with their contemporaries. Special programs in science and French for gifted children who have attained a high achievement level have had few, and sometimes no, Negro participants.
>
> "While it is not possible to determine how much of this is the result of home environment and how much is attributable to schools and teachers, these facts, nonetheless, bear out the testimony of the plaintiffs' expert, Dr. Thomas F. Pettigrew, that racially imbalanced schools are not conducive to learning, that is, to retention, performance, and the development of creativity. Racial concentration . . . communicates to the Negro child that he is different and expected to be different from white children . . .
>
> ". . . it is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors. Education is tax supported and compulsory, and public school educators therefore, must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their making. This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact . . . I cannot accept the view . . . that only forced segregation is incompatible with the requirements of the Fourteenth Amendment . . ."

V. DISCRETIONARY AUTHORITY OF SCHOOL BOARDS

A number of cases, cited below, support the contention that—irrespective of whether or not school authorities *must* take action to undo racial imbalance—they *may* take such action in the exercise of their discretion. The cases tend to indicate that overt considerations of race do not invalidate such actions if the underlying motivation is to facilitate integration rather than segregation.

CALIFORNIA

In June, 1963, the Supreme Court of California stated that:

> ". . . so long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause anti-social attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influences on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause . . ."[33]

NEW JERSEY

A U. S. District Court in New Jersey has aligned itself with the doctrine of the *Blocker* case. Its decision arose from an order of the New Jersey Commissioner of Education requiring the school board of Englewood, New Jersey, to submit a plan to desegregate that city's Lincoln Elementary School, which had a Negro student population of 98 per cent.

The desegregation plan involved the establishment of a sixth-grade school for all sixth grade pupils in the city. In addition, students who had been attending grades one through five in the pre-

dominantly Negro Lincoln school were to be reassigned to other schools.

A suit was filed in the U. S. District Court to enjoin implementation of the desegregation plan on the grounds that it had been based upon considerations of race; that white students would be subjected to discrimination because of their race; and that the Fourteenth Amendment to the U. S. Constitution prohibited the State from requiring a board of education to take affirmative action to eliminate racial imbalance occasioned by housing segregation.

The U. S. District Court reviewed and rejected the arguments that no constitutional requirement existed to eliminate *de facto* segregation in the public schools. It stated, instead, that ". . . this Court is in agreement with the principle . . . that a local board of education is not constitutionally prohibited from taking race into account in drawing or redrawing school attendance lines for the purpose of reducing or eliminating de facto segregation in its public schools."[34]

In another case, the Board of Education of Montclair, New Jersey, had acted to close the Glenfield Junior High School, one of four junior high schools in the school district. Glenfield had the smallest pupil population and the highest annual per capita cost of operation. Its student population was 183, ninety per cent of whom were Negro. Pending the construction of a centralized junior high school to replace all existing junior high schools, the Board of Education decided to reassign the Glenfield pupils on the basis of a procedure whereby the pupils' parents stated their first, second, and third choice and a lottery then assigned them to their first choice as long as space remained available, then to their second choice and finally to their third choice.

Petitions were filed on behalf of five white students, contending that the Montclair school board had adopted a "double standard of school assignment" by applying a neighborhood attendance policy throughout the school district but not as to residents of the Glenfield junior high school zone. The New Jersey Supreme Court[35] noted that the school board's means of reassigning students from the predominantly Negro Glenfield school had been designed as an alternative to a plan which would have assigned them to other schools on the basis of residence. The latter plan would, because of racial residential patterns, have resulted in the assignment of most of Glenfield's Negro pupils to a school which was already 60 per cent Negro. The court noted testimony from

school officials that the dispersal of the Negro students was educationally desirable because ". . . it is a distinct advantage to students to be exposed to children of all kinds of backgrounds . . ."[36]

The court upheld the validity of the reassignment plan on the grounds that, just as the school board could not legally maintain an official policy of segregation, neither was it required to ". . . close its eyes to racial imbalance in its schools which, though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools . . ."[37] The court acknowledged that the Board's actions contained racial motivations, but stated that although "Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts *toward segregation* . . . (it) . . . is not generally apt when the attack is on official efforts toward the *avoidance of segregation.* The moving purpose of Montclair Board and its fulfillment in the manner here may not sensibly be viewed as violative of the Fourteenth Amendment; to us the Board's action appears clearly to have been in sympathetic furtherance of the letter and spirit of the amendment and in fair fulfillment of the high educational functions entrusted to it by law."[38]

NEW YORK

A New York appellate court has ruled that:

> ". . . in drawing attendance lines for a school, it is not only within the power of the (school) board to take into consideration the ethnic composition of the children therein, but that under the decisions of the Supreme Court of the United States it is the board's responsibility so to do in order to prevent the creation of a segregated public school."[39]*

The case involved the construction of a new junior high school. The children scheduled for admittance were in their first year of junior high school and no students were being transferred from one school to another. The attendance district for the new school was composed of an approximately equal number of white, Negro and Puerto Rican students.

* The court also noted the language of the "Second Brown Case" (394 U.S. 295, 1955) involving the question of methods to implement the U.S. Supreme Court 1954 desegregation decision. In the "Second Brown Case," the Supreme Court stated that, in effecting desegregation, ". . .the courts may consider —revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis "

New York state's highest court subsequently stated that:

> "The issue . . . is: May (not must) the schools correct racial imbalance: The simple fact as to the plan adopted and here under attack is that it excludes no one from any school and has no tendency to foster or produce racial segregation.[40]

The U. S. Supreme Court subsequently refused to hear an appeal in this matter.[41]

The foregoing case was relied upon by an appellate court in New York to validate the bussing of students in Rochester, New York, from an overcrowded and predominantly Negro school to a previously all-white school with seven vacant classrooms. The Court stated:

> "There is no doubt in our minds that a substantial factor influencing the decision was the desire to reduce to some extent the racial imbalance existing in the public schools . . . Nevertheless, a determination of the Board of Education which is otherwise lawful and reasonable does not become unlawful merely because the factor of racial imbalance is accorded relevance.[42]

In the New York cases of *Vetere vs. Mitchell* and *Hummel vs. Board of Education of Union Free School District,*[43] the New York State Commissioner of Education had ordered a local school system to implement a program to alleviate racial imbalance. The program included the requirement that *all* pupils from kindergarten through the third grade be assigned to either one of the two predominantly white elementary schools and that *all* pupils in grades four and five be assigned to the predominantly Negro school, thereby causing a greater degree of racial integration than had initially existed in the three elementary schools. (One school was 75 per cent Negro and the proportion was increasing; the other two elementary schools had a Negro enrollment of some 14 per cent). This type of combining is generally referred to as the "Princeton Plan."

A lower state court voided the Commissioner's ruling on the grounds that a New York State statute forbade the exclusion or assignment of students to or from schools on the basis of their race. The appellate court, however, ruled in favor of the Commissioner on the grounds that:

> ". . . in a proper case efforts may be made to correct racial imbalance . . . (and) . . . the court cannot substitute some

other judgment for the judgment of the Commissioner that correction of racial imbalance is an educational aid to a minority group in attaining the skills and level of education which others have had for generations and that compulsory education should be designed for the greatest good of all.[44]

VI. TEACHER ASSIGNMENT

In Ohio, the recruitment, employment, assignment, transfer, and promotion of school personnel, cannot legally be based upon considerations of race, color, religion, national origin, or ancestry inasmuch as school boards, in their capacity as employers, are subject to the anti-discrimination provisions of the Ohio Fair Employment Practices Act.[45]

The central administration of a public school system must, in the final analysis, bear the responsibility for a situation wherein white teachers are permitted to select wholly or predominantly white schools, and Negro teachers are assigned primarily to wholly or predominantly Negro schools.

On the Federal level, a court has included the following provision in a program of desegregation:

> "In the assignment of teachers, principals and other supervising or supporting personnel of schools, the race or color of the person to be assigned and/or the race or color of the pupils attending the school to which the personnel are assigned shall not be one of the criteria in the determination of such assignment."[46]

VII. FEDERAL RIGHTS AND GUARANTEES NOT SUBSERVIENT TO STATE PROCEDURES

Irrespective of the specific outcome of one given case or another, it is now established that the right to invoke federal guarantees of non-discrimination exists independently of state requirements and, therefore, that redress in the federal courts is not contingent upon a prior utilization of the procedures and remedies provided by the various states. This principle was enunciated by the U. S. Supreme Court in June of 1963[47] in a case originating in Illinois.

In this instance, white students had been transferred from an

overcrowded school (which was 97% white) to an under-utilized school, which had been wholly Negro. The plaintiffs alleged that the white students were substantially segregated from the Negro students and that with few exceptions each group used separate entrances and exits and were assigned to different parts of the school. The plaintiffs alleged that this contravened a federal statute which outlawed ". . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . (under) . . . color of any statute, ordinance, regulation, custom or usage of any State or Territory . . ." The lower Federal courts had previously dismissed the case on the grounds that the plaintiffs had failed to exhaust their remedies under an Illinois statute. The Supreme Court reversed, and Justice Douglas stated for the majority that:

> ". . . the right alleged is as plainly federal in origin as those vindicated in *Brown v. Board of Education* . . . for petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. *It is immaterial whether respondent's conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts . . .*"(48)

This doctrine was followed by a Federal District Court in Cleveland in 1964 in rejecting a claim by a school system that the Federal court lacked jurisdiction in a lawsuit alleging segregation because the plaintiffs had not exhausted their remedies under Ohio law.(49)

VIII. CONCLUSION

In the absence of a definitive ruling by the U. S. Supreme Court, as opposed to a refusal to rule on certain cases, it is premature to state that the law, as it relates to *de facto* segregation or "racial imbalance", is settled. In the current state of affairs, precedent can be found in support of a variety of divergent viewpoints.

It appears to be fairly clear, however, that school authorities can, in the exercise of their discretion, voluntarily promote racial integration and the cases have generally sustained such action despite the existing conflict as to whether such action is mandatory.

It is the hope of the Ohio Civil Rights Commission that the information contained in this report will assist the public schools of Ohio to meet their goals of quality of education and equality in education, in accordance with the ideals of American democracy and the teaching profession.

REFERENCES

(1) *Brown v. Board of Education*, 347 U.S. 483 (1954) at p. 493.

(2) *Ibid.*, at pp. 493-494 (emphasis added).

(3) The 1954 decision of the U.S. Supreme Court noted that: "In Sweatt v. Painter in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In McLaurin v. Oklahoma State Regents the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ' his ability to study, to engage in discussions and exchange views with other students, and in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools." (*Ibid*, at pp. 493-494).

(4) *Taylor v. Board of Education of New Rochelle, N. Y.*, 191 F. Supp. 181 (1961), *cert. den.* 368 U.S. 940.

(5) *Ibid*, at pp. 192-193 (Emphasis Added).

(6) *Ibid*, at p. 195.

(7) 195 F. Supp. 231, (1961).

(8) *1961 United States Commission on Civil Rights Report*, Book 2, "Education," p. 174 (Emphasis Added).

(9) *Clemons v. Board of Education of Hillsboro*, 228 F. 2d 853 (1956), *cert. den.* 350 U.S. 1006 (1956).

(10) *Ibid*, (Emphasis added).

(11) *Ibid*, (Emphasis added).

(12) *Board of Education v. The State*, 45 O.S. 555 (1888) at p. 556.

(13) *Brown v. Board of Eduction, op. cit.*, at p. 495.

(14) *Bell v. School City of Gary, Indiana*, 324 F. 2d 209 (1963).

(15) 213 F. Supp. 819 (1963).

(16) *Bell v. School City of Gary, Indiana, op. cit.*, at p. 213.

(17) 377 U.S. 924 (1964).

(18) *Downs v. Board of Education of the City of Kansas City, Kansas*, 336 F. 2d 988, (1964).

(19) 33 Law Week 3286 (March 2, 1965).

(20) *Goss v. Board of Education*, 373 U.S. 683 (1963).

(21) *Lynch v. The Kenston School District Board of Education*, 229 F. Supp. 740, (1964).

(22) *Ibid*, at p. 742.

(23) *Ibid*, at p. 744.

(24) *Craggett v. Board of Education of Cleveland*, 234 F. Supp. 381 (1964). The quoted statement is found at p. 386.

(25) Public Law 88-352, 78 Stat. 241, July 2, 1964.

(26) *Blocker v. Board of Education of Manhasset*, N. Y., 226 F. Supp. 208 (1964).

(27) *Ibid*, at p. 217.

(28) *Ibid*, at p. 218.

(29) *Ibid*, at pp. 226-227. (Emphasis added).

(30) *Blocker v. Board of Education of Manhasset*, N. Y., 229 F. Supp. 709 (1964).

(31) *Ibid*, at p. 712.

(32) *Barksdale v. Springfield School Committee*, U.S. District Court, District of Massachusetts, (Jan 11, 1965); 33 Law Week 2356.

(33) *Jackson v. Pasadena*, 382 P. 2d 878, rehearing denied 7/24/63.

(34) *Fuller v. Volk*, 230 F. Supp. 25, (1964).

(35) *Morean v. Board of Education of the Town of Montclair*, 9 Race Rel. L. Rep. 688, (1964).

(36) *Ibid*, at p. 689.

(37) *Ibid*, at p. 690.

(38) *Ibid*, at p. 691 (Emphasis added).

(39) *Balaban v. Rubin*, 248 N.Y.S. 2d 574, 9 Race Rel. L. Rep. 174 (1964); at p. 175.

(40) *Balaban v. Rubin*, 250 N.Y.S. 2d 281, 9 Race Rel. L. Rep. 691 (1964); at p. 693.

(41) 379 U.S. 881 (1964).

(42) *Strippoli v. Bickal*, N.Y. Supreme Court, Appellate Division, 250 N.Y.S. 2d 969, 9 Race Rel. L. Rep. 1263 (1964); at p. 1265.

(43) *Vetere v. Mitchell and Hummel v. Board of Education of Union Free School District No. 12 of the Town of Hempstead*, N.Y. Supreme Court, Appellate Division, 251 N.Y.S. 2d 480, 9 Race Rel. L. Rep. 1266 (1964).

(44) *Ibid*, at p. 1268.

(45) *Revised Code* 4112.01 through 4112.08 and 4112.99.

(46) *Weaver v. Board of Public Instruction of Brenard County, Florida*, 9 Race Rel. L. Rep. 1202 (1964), at p. 1205.

(47) *McNeese v. Board of Education*, 373 U.S. 668, (1963).

(48) *Ibid*, at p. 674 (Emphasis added).

(49) *Lynch v. The Kenston School District Board of Education, op. cit.*